79-474

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. _____

THE INDIANA EMPLOYMENT SECURITY BOARD, *et al.*,

Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THEODORE L. SENDAK
Attorney General of Indiana

DONALD P. BOGARD
Chief Counsel-Staff

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6217

Attorneys for Petitioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, the Indiana Employment Security Board by and through its individual members, William H. Andrews, George Elrod, Glenn Ray, Richard O. Ristine, and Max Wright; the Indiana Employment Security Division, Unemployment Compensation Section, by and through its Review Board Members William H. Skinner, J. Frank Hanley II, and Ralph F. Miles; and the Indiana Employment Security Division, Unemployment Compensation Section by and through its Appellate Division Chief, Keith Campbell, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) entered in this proceeding on

June 22, 1979. That opinion was pursuant to an appeal by respondents International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW; Barbara Kubisiak; Lynda Baker; Barbara Robbins; Doris Kuntz, and Sherry Blocher.

OPINIONS BELOW

The opinion of the Seventh Circuit appears at 600 F.2d 118 and is attached at page A-1 of this petition. The unreported Memorandum of Decision issued August 10, 1978, by the United States District Court for the Southern District of Indiana, Indianapolis Division (hereafter District Court) and its Entry of October 27, 1978, also unreported, are attached at pages A-5 and A-10 respectively.

JURISDICTION

The Seventh Circuit decided this cause on June 22, 1979, and no rehearing has been sought. This petition for certiorari was filed within the 90-day period allowed by 28 U.S.C. §2101(c). Jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 19(1)(b) of the Rules of this Court, to review an opinion of the Seventh Circuit which has rendered a decision on a federal question contrary to applicable decisions of this Court, the result of which was to declare two Indiana statutes unconstitutional.

QUESTIONS PRESENTED

1. Whether this cause was barred by the Eleventh Amendment to the Constitution of the United States.
2. Whether the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States invalidates a state unemployment compensation statute which does not include among its beneficiaries persons barred from work by their employers because of pregnancy.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides as follows:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens of subjects of any foreign state.

The Fourteenth Amendment to the Constitution of the United States provides, in part, as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Indiana Code §22-4-14-3 (Burns 1974, tit. 22, pp. 428-429) (repealed in relevant part, Pub. L. 253 §1 (1975)):

> An unemployed individual shall be eligible to receive benefits with respect to any week only if he is physically and mentally able to work, is available for work and is found by the division to be making an effort to secure work . . . For the purpose of this article [22-4-1-1 — 22-4-38-3], unavailability for work of an individual shall be deemed to exist but shall not be limited to, any case in which, with respect to any week, it is found:
>
> . . . (d) That such individual's unemployment is due to pregnancy . . . .

Indiana Code §22-4-15-1 (Burns 1974, tit. 22, pp. 434-436) (repealed in relevant part, Pub. L. 262, §25 (1977)):

> [A]n individual shall be ineligible for any waiting period or benefit rights based upon wages earned from any employer whose employ he has left voluntarily without good cause attributable to the employer or from which he has been discharged for misconduct in connection with his work: Provided, however that . . . [s]eparation from employment be-

> cause of pregnancy shall be construed as within the purview of the disqualification provided herein . . . .
>
> The disqualifications provided in this section shall be subject to the following modifications: . . . . (4) An individual who is separated from employment because of pregnancy shall be subject to disqualification under this section only if she fails to apply for or to accept a leave of absence under a plan provided by the separating employer.

Indiana Code §22-4-2-4 provides as follows:

> "Contributions" means the money payments to the employment security fund, required and provided by the terms of this act [22-4-1-1 — 22-4-38-3]. [Acts 1947, ch. 208, §204, p. 673.]

Indiana Code §22-4-2-9 provides as follows:

> "Fund" means the employment security fund, established by IC 1971, 22-4-26-1, in which all contributions required[,] all payments in lieu of contributions and all money received from the federal government as reimbursements pursuant to section 204 of the Federal-State Extended Compensation Act of 1970, 26 U.S.C. §3304n, shall be deposited and from which all benefits provided under this article [22-4-1-1 — 22-4-38-3] shall be paid. [Acts 1947, ch. 208, §209, p. 673; 1971, P.L. 355, §1, p. 1376; 1973, P.L. 239, §1, p. 1242.]

Indiana Code §22-4-10-1 provides, in part, as follows:

> Contributions shall accrue and become payable from each employer for each calendar year in which it is subject to this article [22-4-1-1 — 22-4-38-3] with respect to wages paid during such calendar year except where the status of an employer is changed by cessation of disposition of business or appointment of a receiver, trustees, trustee in bankruptcy or other fiduciary, contributions shall immediately become due and payable on the basis of wages paid or payable by such employer as of the date of the change of status. Such contributions shall be paid to the board in such manner as the

> board may prescribe, and shall not be deducted, in whole or in part, from the remuneration of individuals in an employer's employ.

STATEMENT OF THE CASE

This action was brought by Respondents pursuant to 42 U.S.C. §§ 501 *et seq.*, 1983, and 2000e-2, to secure payment of unemployment benefits to five (5) females who alleged they were denied such benefits due to pregnancy. Respondents alleged violations of the Equal Protection and Due Process clauses of the Fourteenth Amendment to the Constitution of the United States and also sought declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

Facts Material To Questions Presented For Review

At issue in the District Court were portions of Indiana Code § 22-4-14-3 and § 22-4-15-1 (Burns 1974), the relevant parts of which have since been repealed. Respondents sought certification as a class, injunctive and declaratory relief, and unemployment compensation payments with interest thereon. Petitioners moved for dismissal on several grounds, and the District Court granted that motion based upon Respondents' failure to state a claim upon which relief could be granted. A-9. Respondents then moved the court to reconsider, and to alter or amend its judgment. The District Court reconsidered this Court's opinions in *Turner v. Department of Employment Security, infra,* and *Cleveland Board of Education v. LaFleur, infra,* and, finding them inapposite, denied the motion. A-10.

The Seventh Circuit reversed the judgment and remanded the case for further proceedings, holding that the statutes violated the Due Process Clause as it was applied in *Turner.*

Answers to Interrogatories filed in this case show that of the four original individual Plaintiffs in the District Court, three had never applied for unemployment compensation benefits and the fourth had not received a determination from the reviewing deputy. A fifth plaintiff who alleged a denial of benefits was added in the Second

Amended Complaint, which was allowed to be filed by leave of Court in the Memorandum of Decision that rendered judgment in favor of the Defendants.

Those Interrogatory Answers also show that the periods of time between separation from employment and childbirth for the five named Plaintiffs were 3, 39, 40, 91 and 128 days.

REASONS FOR ALLOWANCE OF THE WRIT

I.

This Cause is Barred by the Eleventh Amendment to the Constitution of the United States.

Petitioners would submit that jurisdiction in this case was barred by the Eleventh Amendment to the Constitution of the United States. Respondents herein brought this action against the Petitioner boards and divisions and their members in their official capacities for the payment of past workmen's compensation benefits which were alleged to have been wrongfully denied. As such, this is a suit against the State of Indiana since the Petitioners are but nominal parties and any recovery will come from public funds derived from the State Treasury. Indiana Code §§ 22-4-2-4, 22-4-2-9, and 22-4-10-1. *Ford Motor Company v. Department of Treasury of State of Indiana,* 323 U.S. 459 (1945).

Injunctive relief has obviously been precluded since the statutes being challenged have been repealed by the Indiana General Assembly. Therefore, the only relief that could possibly be ordered by the District Court would be the payment of past benefits. Such payments would be precluded under *Edelman v. Jordan,* 415 U.S. 651 (1974).

II.

The Seventh Circuit's Decision Rests on the Application of Law Inapposite to the Facts of This Case.

The Seventh Circuit stated that "we are of course bound to follow the *Turner* holding," which it interpreted to

mean that a "state statute that denies unemployment benefits to all women who are unemployed because of pregnancy without regard to whether individual pregnant women have the physical capacity to continue work is invalid . . . ." The fact situation in the case at bar, however, does not warrant application of *Turner v. Department of Employment Security,* 423 U.S. 44 (1975).

The statute at issue in *Turner* raised "a conclusive presumption that women are 'unable to work' during" a period extending from twelve weeks prior to the expected birth to six weeks after the birth, *id.* at 45. This Court held that the "statute's incorporation of a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid under the principles of" *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974). Id. at 46. At issue in *LaFleur* was a school board rule requiring pregnant teachers to take a leave extending from five months before the expected date of birth until the beginning of the semester following the date when the child was three months of age. In a companion case to *LaFleur, Cohen v. Chesterfield County School Board,* 414 U.S. 632 (1974), decided the same day, the school regulations at issue were essentially the same. This Court held that due process requires something other than a blanket rule to accomplish the school boards' goals. Although this Court has not articulated what "alternative administrative means" (*id.* at 647) are required, it noted that its holding did *not* require "an individualized determination in each case and in every circumstance," *id.* at n. 13.

The Indiana statutes invalidated by the Seventh Circuit did not prescribe any period during which pregnant persons should be separated from employment; they left that determination up to the employers and the workers. Likewise, the statutes at issue did not incorporate "a conclusive presumption of incapacity." One of the laws deemed an individual whose "umemployment is due to pregnancy" to be unavailable for work (Ind. Code Ann. § 22-4-14-3 (Burns 1974)); the other disqualified from benefit rights a woman separated from employment due to pregnancy "only if she fails to apply for or to accept a leave of absence under a plan provided by the separating employer" (Ind.

Code Ann. § 22-4-15-1 (Burns 1974)). As the District Court correctly realized.

> . . . Indiana creates no blanket presumption. The system merely assumes that if a woman terminates her employment because of pregnancy it is done voluntarily and without good cause. It is hard to conceive of a more reasonable basis upon which the Indiana legislature could have excluded pregnancy, an action which it is constitutionally permitted to make.

Because the invalidated statutes did not prescribe any period of unemployment and did not conclusively presume incapacitation, the Seventh Circuit erred in applying *Turner* to them. Instead, the applicable cases are *Nashville Gas Co. v. Satty,* 434 U.S. 136 (1977), *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976), and *Geduldig v. Aiello,* 417 U.S. 484 (1974), which upheld similar pregnancy-excluding programs attacked on statutory and constitutional grounds.

The results of the Seventh Circuit's error could have far reaching effects. Respondents, in District Court, sought certification of a class composed of all persons, separated from work because of pregnancy, who did not receive unemployment compensation for the period of separation. One of the statutes at issue, Ind. Code § 22-4-14-3 (Burns 1974) was enacted in 1947 and partly repealed in 1975; the other, Ind. Code § 22-4-15-1 (Burns 1974) was amended to include the relevant portions in 1967 and 1971, and then partly repealed in 1977.

There is uncertainty as to the proper application of the *Aiello-Gilbert-Satty* and the *LaFleur-Turner* lines of cases, as is demonstrated by the opposite results reached by the District Court, in its two written opinions, and the Seventh Circuit, in the sentence quoted *supra,* at page 6. The resolution of this uncertainty will influence the lives and finances of many persons, including those who seek unemployment benefits, those who contribute to the fund, and the State of Indiana. If the District Court certifies a class as a result of the remand order, then the State will be forced to search unemployment records going back nearly thirty years, all as a result of the erroneous decision of the

Seventh Circuit which is contrary to applicable decisions of this court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion and judgment of the Seventh Circuit.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

DONALD P. BOGARD
Chief Counsel-Staff

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6217

Attorneys for Petitioner.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 78-2548

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, et al.,
Plaintiff-Appellants,

v.

THE INDIANA EMPLOYMENT SECURITY BOARD, et al.,
Defendant-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 76-705-C — S. HUGH DILLIN, *Judge.*

ARGUED APRIL 25, 1979 — DECIDED JUNE 22, 1979

Before SWYGERT, *Circuit Judge,* MOORE, *Senior Circuit Judge,** and TONE, *Circuit Judge.*

TONE, *Circuit Judge.* The issue in this case is the constitutionality of Indiana statutory provisions, now repealed, that denied unemployment compensation to women who were willing and able to work but were denied the opportunity to do so because of pregnancy. We hold these provisions unconstitutional and reverse the district court's judgment to the contrary.

---

* The Honorable Leonard P. Moore, Senior Circuit Judge of the United States Court of Appeals for the Second Circuit, is sitting by designation.

The plaintiff union brought the action both as an employer-contributor to an employment compensation fund governed by the Indiana Employment Security Act, Ind. Code Ann. § 22-4-1-1, *et seq.* (Burns), and on behalf of those of its members denied compensation from the fund because of the challenged statutory provisions. In addition, five individual plaintiffs assert claims for unemployment compensation and also seek to represent a class of all women similarly situated. The defendants are Indiana officials responsible for administering the Act. Proceeding under 42 U.S.C. § 1983, plaintiffs claim that the provisions in question violate the Fourteenth Amendment. Other alleged bases of jurisdiction and theories of invalidity need not concern us. The district court dismissed the action for failure to state a claim on which relief can be granted without determining whether the action should proceed as a class action.

The Indiana Employment Security Act provides for the payment of unemployment compensation benefits to unemployed persons who are able to work, available for work, and making an effort to obtain work, and who have neither left their previous place of employment voluntarily without good cause attributable to the employer nor been discharged for misconduct in connection with work. Ind. Code Ann. §§ 22-4-14-1 through 22-4-14-7 and 22-4-15-1 through 22-4-15-8 (Burns). The provisions challenged in this case provided that if an "individual's unemployment is due to pregnancy" she would be deemed unavailable for work and therefore ineligible to receive benefits, former § 22-4-14-3(d),[1] repealed in relevant part, Pub. L. 253, § 1 (1975), and that a woman separated from employment "because of pregnancy" was disqualified from

[1] Ind. Code Ann. § 22-4-14-3(d) (Burns) read in relevant part:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if he is physically and mentally able to work, is available for work and is found by the division to be making an effort to secure work . . . For the purpose of this article [22-4-1 — 22-4-38-38], unavailability for work of an individual shall be deemed to exist but shall not be limited to, any case in which, with respect to any week, it is found: . . .
>
> (d) That such individual's unemployment is due to pregnancy.

receiving unemployment benefits, § 22-4-15-1,[2] repealed in relevant part, Pub. L. 262, § 25 (1977). The amended complaint in the case at bar alleges that at least one of the individual plaintiffs was denied unemployment benefits on the ground, among others, of her pregnancy and that another was not even allowed to file a claim because of her pregnancy.

As we view the case, it falls squarely within *Turner v. Department of Employment Security of Utah,* 423 U.S. 44 (1975), which held unconstitutional under the Fourteenth Amendment a Utah statute that made "pregnant women ineligible for unemployment benefits for a period extending from 12 weeks before the expected date of childbirth until a date six weeks after childbirth." *Id.* In so holding, the Court relied upon *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974). Regardless of the current status of the irrebuttable presumption doctrine, *see Trafelet v. Thompson,* 594 F.2d 623, 629-630 (7th Cir. 1979), we are of course bound to follow the *Turner* holding. A state statute that denies unemployment benefits to all women who are unemployed because of pregnancy without regard to whether individual pregnant women have the

[2] Ind. Code Ann. § 22-4-15-1 (Burns) read in relevant part:

> With respect to benefit periods established subsequent to July 1, 1967 and prior to July 4, 1971, other provisions of this article [22-4-1-1 — 22-4-38-3] notwithstanding, an individual shall be ineligible for any waiting period or benefit rights based upon wages earned from any employer whose employ he has left voluntarily without good cause attributable to the employer or from which he has been discharged for misconduct in connection with his work: . . . Provided, further, however, That the provisions of this paragraph shall be subject to the following modifications:
>
> . . . (2) Separation from employment because of pregnancy shall be construed as within the purview of the disqualification provided herein . . .
>
> The disqualifications provided in this section shall be subject to the following modifications: . . .
>
> (4) An individual who is separated from employment because of pregnancy shall be subject to disqualification under this section only if she fails to apply for or to accept a leave of absence under a plan provided by the separating employer.

The Indiana legislature amended § 22-4-15-1 to include the first paragraph quoted above in 1967, Ind. Acts. ch. 310 § 19; it added the second quoted paragraph in 1971, Pub. L. 355 § 35.

physical capacity to continue work is invalid under that holding.

Indeed, counsel for defendants has recognized the authority of *Turner* in his oral argument and his brief, although in the latter a desultory reference is made to *Gelduldig v. Aiello*, 417 U.S. 484 (1974), *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), as cases "this case should follow." Counsel's only attempt to distinguish *Turner* is his argument that the challenged Indiana statutory provisions "do not deny the woman a chance to show that she is able and willing to work," and that "only women who are unable or unwilling to work because of pregnancy are denied benefits." This argument simply ignores the unequivocal statutory declarations that "unavailability for work of an individual shall be deemed to exist . . . [in] any case in which . . . it is found . . . [t]hat such individual's unemployment is due to pregnancy," see note 1, *supra*, and that "[s]eparation from employment because of pregnancy shall be construed as within the purview of the disqualification provided" with respect to individuals who left their employment voluntarily without good cause attributable to the employer or who were discharged for misconduct, see note 2, *supra*. When the defendants' attempt to distort the statutory language is disposed of, nothing is left of their argument and *Turner* plainly controls.

The judgment is reversed and the case is remanded to the district court with directions to determine whether it should proceed as a class action and for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

No. IP 76-705-C

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,

Plaintiffs,

v.

THE INDIANA EMPLOYMENT SECURITY BOARD, *et al.*,

Defendants.

August 10, 1978

S. Hugh Dillin, *Judge*

MEMORANDUM OF DECISION

This case comes before the Court on three motions. Plaintiffs move in the first instance to amend the complaint a second time. Plaintiffs also seek a determination that the cause be maintained as a class action.

Defendants move the Court for dismissal, alleging lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, failure to join indispensable parties, and bar by virtue of the doctrine of Sovereign Immunity and the Eleventh Amendment of the United States Constitution.

Plaintiffs' Amended Motion to Amend

The second amended complaint does not alter the substance of the alleged cause of action, and defendants do not show prejudice in their opposing memorandum.

Plaintiffs' amended motion to file a second amended complaint is therefore granted.

Defendants' Motion to Dismiss

Defendants' motion to dismiss addressed the first amended complaint. Because the two amended complaints are identical in substance, the motion to dismiss will be treated as responsive to the second complaint.

Plaintiffs maintain that they have been denied unemployment benefits under the Indiana Employment Security Act in a sexually discriminatory manner. All plaintiffs are alleged to have been separated from their employment due to pregnancy and without cause. Plaintiffs Baker, Robbins and Kuntz did not apply for unemployment benefits because of the statute in question and because of the policies of defendants in applying the statutes. Plaintiff Kubisiak attempted to apply for benefits but was not permitted to do so. Plaintiff Blocher did apply but was denied benefits.

Two statutory sections are challenged. The first reads in relevant part:

> "... unavailability for work of an individual shall be deemed to exist ... when it is found ... that such individual's unemployment is due to pregnancy ...." I.C. 22-4-14-3.

The above language was deleted from the section in 1975. P.L. 253 (1975).

The second reads as follows insofar as is relevant to this discussion:

> "Separation from employment because of pregnancy shall be construed as within the purview of the disqualification [from eligibility for unemployment compensation benefits on the ground that the applicant left her job voluntarily and without good cause] provided herein ...." I.C. 22-4-15-1.

That language has also been repealed. P.L. 262 (1977).

Thus, insofar as plaintiffs seek a declaration regarding the statutory sections, the issue is moot and requires no decision.

The question remains as to the entitlement of plaintiffs to back unemployment benefits denied them under the old sections 22-4-14-3 and 22-4-15-1. It is the opinion of this Court that plaintiffs are not so entitled.

The United States Supreme Court has spoken three times to the issue of unemployment compensation systems which deny benefits to women who stop work as a result of pregnancy.

The cause of Geduldig v. Aiello, 41 L.Ed.2d 256 (1974), is on point. In that case, the California disability insurance system was challenged insofar as it excluded from coverage certain pregnancy related disabilities. The Court upheld the California system, stating that exclusion of the disabilities was not "invidious discrimination under the Equal Protection Clause." 41 L.Ed.2d at 263.

A similar though not identical situation was addressed in General Electric Co. vs. Gilbert, 50 L.Ed.2d 343 (1976). The contention was that denial of benefits to pregnant women under an *employer's* disability plan ran contrary to Title VII of the Civil Rights Act of 1964. The Court stated explicitly that the *Geduldig* case, which arose under a Fourteenth Amendment claim, was relevant to resolving the Title VII question in *Gilbert.* The Court applied the *Geduldig* reasoning and again held that exclusion of pregnancy benefits is not discrimination based on sex unless the exclusion is shown to be a mere pretext "'designed to effect an invidious discrimination against the members of one sex or the other.'" 50 L.Ed.2d at 354 (quoting *Geduldig*). The non-discriminatory distinction must be shown to be a subterfuge. At 354.

Most recently, in the case of Nashville Gas v. Satty, 46 L.W. 4026 (1977), the Court dealt with another employer funded disability plan. Plaintiff was forced by her employer to leave work and was denied sick pay normally provided by the employer for nonoccupational sickness or injury. The Court found the sick pay system used by Nashville Gas to be indistinguishable from the insurance plan in *Gilbert,* and upheld the system based on the fact that plaintiff had not shown that the plan was used as a pretext for invidious sex discrimination. 46 L.W. at 4028.

The Indiana Employment Security Act is arguably distinguishable from either an employer or state operated disability insurance plan because it is designed to remedy economic insecurity resulting from mere unemployment, rather than to compensate disabilities which are related to unemployment. See I.C. 22-4-1-1, et seq.

A person may be disqualified for benefits under the Act if she is discharged "with just cause" or if she leaves the job "voluntarily without good cause." See I.C. 22-4-15-1.

Under the now deleted language of Section 22-4-15-1, unemployment by reason of pregnancy was deemed automatically to be departure without good cause or termination with just cause.

The relevant inquiry is therefore whether the Indiana system, which is to remedy mere lack of work, is sufficiently different from the systems in the *Geduldig, Gilbert* and *Satty* cases such as to command a different result.

This Court believes that it is not. Indiana's unemployment compensation system is financed by employer contributions. Like the other three systems, it is designed to compensate for loss occasioned by a given set of risks. Some risks are specifically excluded. For example, persons who are physically unable to work are not eligible for compensation. I.C. 22-4-14-3. Ostensibly, compensation for pregnancy related disability and lost pay could be undertaken by individual employers in their own workmen's compensation packages. However, neither the state nor private employers are constitutionally required to do so. As Justice Rehnquist stated in *Gilbert:*

> "Absent a showing that distinction involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation . . . on any reasonable basis, just as with respect to any other physical condition." 50 L.Ed.2d at 353.

Plaintiffs do not allege that the language previously in the Indiana statute operated as a pretext for invidious discrimination based on sex.

For the foregoing reasons, plaintiffs have failed to state a claim upon which relief can be granted. Defendants' motion to dismiss is hereby granted.

This decision renders unnecessary the resolution of plaintiffs' motion for determination as a class action and of the other grounds for dismissal alleged by defendants.

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF INDIANA,
INDIANAPOLIS DIVISION

No. IP 76-705-C

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,

Plaintiffs,

v.

THE INDIANA EMPLOYMENT SECURITY BOARD, *et al.*,

Defendants.

October 27, 1978

S. Hugh Dillin, *Judge*

ENTRY

This case is before the Court on plaintiffs' motion to alter or amend and to reconsider the judgment entered on August 10, 1978. Plaintiffs contend that the Court misapplied Geduldig v. Aiello, 417 U.S. 484, 41 L.Ed.2d 256 (1974); General Electric v. Gilbert, 429 U.S. 125, 50 L.Ed.2d 343 (1976), and Nashville Gas Co. v. Satty, ——— U.S. ———, 54 L.Ed.2d 356 (1978). Plaintiffs also maintain that since the Indiana Employment Security Act has led to a denial of benefits in a sexually discriminatory manner and has created an unjustified conclusive presumption in violation of the Fourteenth Amendment's Due Process Clause, the cases of Turner v. Department of Employment Security, 423 U.S. 44, 46 L.Ed.2d 181 (1975), and Cleveland Board of Education v. LaFleur, 414 U.S. 632, 39 L.Ed.2d 52 (1974), should have been applied. Plaintiffs state that the proper inquiry is whether the Indiana system is sufficiently different from the systems in *Turner* and *LaFleur*, and not whether the Indiana system is sufficiently different from the systems in *Geduldig*, *Gilbert* and *Satty* to command a different result.

Discussion

Plaintiffs' reliance on *Turner* and *LaFleur* is in error. In *LaFleur* the school board had a rule that a pregnant teacher must take a mandatory maternity leave beginning five months before the expected birth. The teacher was required to give notice of her pregnancy at least two weeks prior to the time she was to begin her maternity leave. The teacher would not become eligible for reemployment until the beginning of the next school semester after her child was three months old, provided a physician issued a certificate attesting to the teacher's health. Justice Stewart, speaking for five members of the Court, said that the mandatory employment termination provisions contained in the maternity leave rule were violative of the Due Process Clause of the Fourteenth Amendment for two reasons. First, the rule swept too broadly in implementing both the school board's interest in continuity of instruction and the state's interest in keeping physically unfit teachers out of the classroom. Second, the rule's conclusive presumption that every pregnant teacher who reached the fifth or sixth month of pregnancy was physically incapable of continuing her job is neither necessarily nor universally true. 414 U.S. at 648, 39 L.Ed.2d at 64.

Turner involved a Utah statute which created a conclusive presumption that women are unable to work during a period of approximately eighteen weeks, extending from twelve weeks before the expected date of childbirth until six weeks after childbirth. In *Turner* the petitioner was separated from her employment for reasons unrelated to her pregnancy. She received unemployment benefits except for the eighteen week period as provided in the statute. The state's highest court had construed the statute as creating a conclusive presumption that women are unable to work during that eighteen week period. The

United States Supreme Court held that the statute violated the Due Process Clause of the Fourteenth Amendment since it could not be doubted that a substantial number of women are fully capable of working well into their last trimester of pregnancy and of resuming employment shortly after childbirth. 423 U.S. at 45-46, 46 L.Ed.2d at 183-184. The Fourteenth Amendment, the Court said, requires that unemployment compensation boards must achieve legitimate state ends through more individualized means when basic human liberties are at stake. 423 U.S. at 46, 46 L.Ed.2d at 184.

It is clear that the Indiana system is significantly different from those discussed in *Turner* and *LaFleur*. The Indiana statute, since repealed, created no presumption of a pregnant woman's inability to work. A pregnant woman was disqualified from eligibility for unemployment compensation benefits on the ground that she had left her job voluntarily and without good cause. Thus the presumption created is not one of disability but one of voluntariness or the absence of good cause. It is this point which distinguishes the Indiana system from the systems struck down in *Turner* and *LaFleur*. In a *Turner*-type situation in Indiana, a pregnant woman would likely continue to receive benefits throughout the pregnancy so long as she was available for work within the meaning of the statute. However, if her condition made her unavailable for work she would, of course, be denied benefits.

Therefore, the Court must conclude, as it did in its decision of August 10, 1978, that the Indiana system is similar to those upheld in *Geduldig*, *Gilbert* and *Satty*. The state is free to exclude pregnancy from the coverage of legislation on any reasonable basis, just as it may exclude any other physical condition. *Gilbert, supra*. Indiana creates no blanket presumption. The system merely assumes that if a woman terminates her employment because of pregnancy it is done voluntarily and without good cause. It is hard to conceive of a more reasonable basis upon which the Indiana legislature could have excluded pregnancy, an action which it is constitutionally permitted to make.

For the foregoing reasons, plaintiffs have failed to persuade the Court that its original decision was improper.

Plaintiffs' motion to alter or amend the judgment and for reconsideration is hereby denied.